

EXHIBIT 2

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MIDDLESEX COUNTY
DOCKET NO. MID-L-000160-22
APP. DIV. NO. _____

JEFFREY ACHEY, et al., :
Plaintiffs, : TRANSCRIPT
v. : OF
CELLCO PARTNERSHIP d/b/a : MOTION TO COMPEL
VERIZON WIRELESS; and : ARBITRATION
VERIZON COMMUNICATIONS INC., :
Defendants. :
Place: Middlesex County
(Heard via Zoom)

Date: July 15, 2022

BEFORE:

HONORABLE J. RANDALL CORMAN, J.S.C.

TRANSCRIPT ORDERED BY:

MICHAEL C. ZOGBY, ESQ. (Faegre Drinker Biddle &
Reath LLP)

APPEARANCES:

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Prince, P.C.)

- and -

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- and -

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(Proceedings commenced at 11:16 a.m.)

THE COURT: All right. It's quarter after 11, July the 15th. This is Judge Corman, Middlesex County Superior Court.

Our next case is L-160-22. Plaintiffs are Jeffrey Achey, et al., defendants are Cellco Partnership doing business as Verizon Wireless and Verizon Communication, Incorporated.

Will the plaintiffs' counsel please enter an appearance.

MR. DeNITTIS: Good morning, Your Honor.
Stephen DeNittis from DeNittis Osefchen and Prince on
behalf of the plaintiffs.

THE COURT: Will defendants' counsel please enter an appearance.

MR. JACOBSON: Good morning, Your Honor. This is Jeffrey Jacobson from Faegre Drinker. I'm joined by my colleague Marina Lev from Quinn Emanuel, whose pro hac motion is pending. I'll be doing the arguing on the motion.

THE COURT: Okay. This is the defendant's order to -- to stay and compel arbitration.

Counsel, what would you like to tell me about your motion?

MR. JACOBSON: Your Honor, this is Jeffrey

Jacobson, again.

The three most important facts relevant to this motion are undisputed.

The plaintiffs agree that they consented to a contract requiring the -- requiring them to arbitrate disputes.

They agree that all of the claims they want to pursue against Verizon are covered by that agreement to arbitrate. And the customer agreement itself incorporates either customers have the choice of the AAA or Better Business Bureau. It incorporates the rules of the AAA and the BBB. And both of those rules delegate to arbitrators the kind of challenges that the plaintiffs are making to the customer agreements enforceability.

The Third Circuit, every Federal District Court in New Jersey to consider the issue in the Appellate Division on multiple occasions, albeit in unpublished decisions, has held that reference to rules with delegation provisions suffices to require courts to let arbitrators decide these challenges and not hear them themselves.

I'd submit, Your Honor, that those three facts are decisive here. The plaintiffs' unconscionability arguments with regard to the customer

1 agreement are wrong. And I'm happy to talk to the
 2 Court about why they're wrong, but those are fights we
 3 should be having in front of arbitrators and not Your
 4 Honor.

5 It's likely that the Court has questions
 6 about the main argument plaintiffs here have made
 7 against compelling these claims to arbitration, which
 8 is the idea that the customer agreements, mass
 9 arbitration provisions, and the statutes of limitation
 10 applicable to plaintiffs' claims are what they call a
 11 one-two punch, effectively block plaintiffs from
 12 pursuing these claims at all. It's just not.

13 With respect to the statute of limitations,
 14 the people represented by plaintiffs' counsel here in
 15 arbitration cases, and they say they've got about 2500
 16 of them, have all provided timely notices of claim as
 17 the customer agreement requires.

18 Your Honor, it would be beyond disingenuous
 19 for Verizon to argue that the limitations period is
 20 continuing to run against these people while they're
 21 following the agreement's mass arbitration provisions.
 22 Verizon has never made that argument and we would be
 23 laughed at by any arbitrator if we tried.

24 The customer agreement's mass arbitration
 25 provision provides a bellwether process for a series of

1 ten claims to go forward at a time, plaintiffs choose
 2 five, Verizon choose five. See how those go. Another
 3 process after that. See how those go. And it -- that
 4 bellwether process allows -- has two goals. It's
 5 primary goal is to foster resolution of a mass of
 6 claims by letting the parties test their arguments in a
 7 fair sampling of cases. If Verizon goes ten and oh,
 8 one suspects the plaintiffs will not throw good money
 9 after bad. On the other hand, if Verizon goes oh for
 10 ten, and then if which ever side loses maybe wants to
 11 try again and goes oh for ten again, it would be very
 12 difficult for either side to contend that the batching
 13 process should continue rather than yielding an
 14 agreement to resolve the claims on -- on a mass basis.

15 But here's the important part. Your Honor,
 16 the customer agreement explicitly says that the
 17 bellwether process should proceed, and this is a quote,
 18 "until the parties are able to resolve all of the
 19 claims." And it gives the court full authority to
 20 enforce that part of the agreement.

21 So if plaintiffs are right on the merits,
 22 which they're not, but if the plaintiffs are right on
 23 the merits and they prove that, if they beat Verizon
 24 consistently in the bellwether cases and if Verizon
 25 doesn't act appropriately in response, nothing stops

1 these counsel from coming back to the court and seeking
 2 relief. But that's a lot of ifs. They haven't
 3 happened yet. And Verizon has no reason to believe
 4 they'll ever happen.

5 And, by the way, the customer agreement says
 6 that every winning customer in arbitration gets \$5,000
 7 minimum, plus attorneys' fees. So -- while the process
 8 unfolds. So there's no -- there's no incentive for
 9 Verizon to keep going if it -- if it's losing. By
 10 contrast, as I said, there's no incentive for
 11 plaintiffs to keep going if they're losing.

12 But the second goal of the mass arbitration
 13 provision is just as important as the first. It's to
 14 avoid a situation where Verizon has to choose between
 15 an unfair settlement that the plaintiffs haven't earned
 16 by advancing the merits of their claims or paying AAA
 17 millions of dollars in fees for arbitration cases that
 18 in all relevant likelihood will not actually proceed.

19 And the plaintiffs' argument that Verizon is
 20 the only company it knows of that's adopted a provision
 21 like this, it so happens that I got an e-mail as a --
 22 as a Microsoft customer this morning that Microsoft
 23 adopted the identical provision last night. The only
 24 difference between Microsoft and Verizon is that
 25 Microsoft's batching process is 50, not 10.

1 So this is something that companies in
 2 Verizon's position are dealing with this mass
 3 arbitration problem the same way. It does not make
 4 sense, I would submit, to allow thousands of
 5 arbitration claims to be filed at once where the only
 6 consequence of filing is triggering an obligation on
 7 the part of Verizon, or whatever company is in
 8 Verizon's position, to pay thousands of dollars to AAA
 9 for each claim filed. And it allows lawyers on the
 10 other side to be able say, hey, either settle with us
 11 or you've got to write a multimillion-dollar check to
 12 AAA.

13 That's all we're trying to avoid through this
 14 batching process. And as I said, if the batching
 15 process goes poorly for Verizon and Verizon were to try
 16 to continue to force claims into arbitration after it
 17 went oh for ten or oh for twenty, that would be the
 18 time for plaintiffs to come back and argue that Verizon
 19 is acting disingenuously, that Verizon is acting
 20 contrary to the stated goal of the process, which is to
 21 yield a resolution.

22 But it's not -- that -- that claim is not
 23 ripe now. What should happen now, because there's no
 24 disagree about the existence of a -- of an agreement to
 25 arbitrate disputes. There's no dispute that these

1 claims are covered by it. And the other challenge that
 2 plaintiffs made to enforceability of certain other
 3 provisions of the agreement are for the arbitrators.

4 So if the Court has any questions, I'm happy
 5 to address those questions. It may be more
 6 appropriate, though, to hear what plaintiffs have to
 7 say and then I can briefly reply.

8 THE COURT: Thank you, Counsel.

9 All right. We'll go to plaintiffs' counsel.
 10 What do you got to say about all that?

11 MR. DeNITTIS: Sure, Your Honor.

12 Well, I'd like to start off first that -- why
 13 we're here. We're here -- plaintiffs would like to
 14 bring their case as a class action. A class action
 15 where other than a filing fee with the court, there is
 16 no cost to do a class action. There would be no fees
 17 by AAA arbitration or by any other arbitration service.

18 We're faced with this arbitration clause
 19 because this is what defendants drafted and this is
 20 what defendants wanted because they want to avoid a
 21 class action. They want to not have a case with a mass
 22 amount of people.

23 So we're -- we -- we do represent 2500 other
 24 people, not New Jersey persons, but people from other
 25 states in arbitration. And it is \$3,000 a person to do

1 such arbitration. But as you see here, defendants want
 2 this in arbitration. So this is -- they want these 27
 3 people to be with those persons. This is where they
 4 want to be, despite the cost.

5 But any -- any argument that this is like
 6 some type of extortion attempt or that this is some
 7 type of a way for plaintiffs to take advantage of the
 8 process is -- is really somewhat ridiculous in that
 9 this is what defendants wanted. This is what they
 10 drafted. I mean, they don't have to have an
 11 arbitration clause. They could actually withdraw their
 12 motion if they're so worried about the filing fees and
 13 permit us to just go forward with our case. It's not
 14 certified yet. It's 27 people.

15 So I want to make that mention to the Court
 16 because this isn't -- there isn't some reason to feel
 17 pity for Verizon. The reason why these companies are
 18 drafting these clauses is because of the advent of the
 19 mass arbitration. Yes, consumers are aggrieved.
 20 Consumers are frustrated. And court -- and companies
 21 like Verizon have been getting sued because this is
 22 what they require since we can't do a -- they don't
 23 want a class action in court. They -- people file mass
 24 arbitration. And, unfortunately, the process is very
 25 costly. And so now that this is happening, defendants

1 don't like it.

2 And so defendants attempted in several courts
 3 to say, oh, these mass arbitrations are unfair and
 4 these should not be enforceable because it's so costly
 5 and they've lost on every single case where they've
 6 attempted to do that because -- because courts around
 7 the country have said, really, you've been arguing to
 8 enforce arbitration for 40 years, you -- you have what
 9 you want and now because people have filed a large
 10 number of claims, you don't like it, tough, this is
 11 your agreement.

12 So I want to -- I want to make sure the Court
 13 is aware this -- this is not some pity party for
 14 Verizon.

15 Now to get to the merits of what Your Honor
 16 has to decide in this motion. Defense counsel is
 17 right, there is an agreement and people didn't
 18 willingly consent because it's a contract of adhesion,
 19 but when they bought their phones they had an eight-
 20 page arbitration clause thrust upon them without much
 21 choice, and they signed it. We agree on that.

22 But what defense counsel leaves out is, Your
 23 Honor has two decisions to make. One, who should
 24 decide this arbitration motion. And it should be Your
 25 Honor, which I'll get to. And then, two, should -- is

1 this conscionable. Because just because people agree
 2 to an arbitration clause, yes, there's the Federal
 3 Arbitration Act. But the Federal Arbitration Act and
 4 the case law makes clear that any arbitration clause
 5 for it to be enforceable must not be unconscionable.
 6 And so -- and that is Your Honor's function as the
 7 gatekeeper, to make that determination.

8 And we submit, for all the reasons set forth
 9 in our papers and I'm going to put forth today, this is
 10 not only unconscionable, this is really one of the most
 11 uneven, over-heavy handed agreements for a consumer to
 12 have to face to litigate their claims.

13 So let's get to the delegation clause. As --
 14 as the Federal Court determined in the MacClelland
 15 case, this exact issue, which is persuasive authority
 16 before Your Honor, not -- not binding authority. But
 17 the standard in California is identical to the standard
 18 in New Jersey, which is there's a presumption. Under
 19 Morgan v. Stanford, New Jersey Supreme Court 225 N.J.
 20 289, (2016), there's a standard for whether who --
 21 whether an arbitrator or a court decides an arbitration
 22 court -- clause.

23 And the Supreme Court has said it's a
 24 presumption that the court decides the arbitration
 25 clause, unless there's clear and unmistakable evidence

1 that the parties agreed to arbitrate arbitrability.
 2

3 Here there's four main reasons why this
 4 should be decided by Your Honor and not by an
 5 arbitrator.

6 Number one, the clause, the eight-page
 7 arbitration clause, in several instances is aspects of
 8 the clause to be enforced by the Court as defense
 9 counsel pointed out, that we could go back to court if
 10 we don't like the mass arbitration provision and -- and
 11 have the Court decide that portion of the arb clause.
 12 Which it's really not clear what portion is referenced
 13 by that -- by the -- by that -- by that statement.

14 It also references AAA and BBB rules, which
 15 they conflict, and I'll get to that in a moment.

16 And so those are really big issues.

17 And, third, which you -- we didn't cite this
 18 in our papers because we didn't -- we couldn't file a
 19 surreply, but there's a case that decides this exact
 20 issue called Alpert Goldberg Butler v. Quinn, 410 N.J.
 21 Super. 510, (App. Div. 2009). And what that court says
 22 -- what -- what that case says is, in order for there
 23 to be a proper and enforceable incorporation by
 24 reference of a separate document or website, the
 25 document to be incorporated must be described in such
 terms that its identity may be ascertained beyond doubt

1 and the party to be bound by the terms must have had
 2 knowledge of and assented to the incorporated terms.

3 And that case was also -- and that's a
 4 published decision.

5 THE COURT: What's the cite --

6 MR. DeNITTIS: And that was also --

7 THE COURT: -- on that, Counsel? Give me the
 8 cite again, Counsel.

9 MR. DeNITTIS: Sure. It's 410 N.J. Super.
 10 510.

11 THE COURT: Thank you.

12 MR. DeNITTIS: Appellate Division 2009.

13 THE COURT: Okay.

14 MR. DeNITTIS: And it's -- al -- Alpert v.
 15 Quinn.

16 And that's also followed by Bacon v. Avis
 17 Budget Group, 357 F.Supp 3d. 401, (D.N.J. 2018).

18 That -- the Bacon case deals specifically --
 19 they both deal with arbitration clauses. And what that
 20 means is, if you're going to make it set forth that
 21 you're going to incorporate something by reference, and
 22 the Bacon case was right on point with this, as well,
 23 you just can't blanket refer to something. It has to
 24 be specific. It has to be exactly to what is looking
 25 to be enforced.

1 If you look at the arb clause, all that
 2 reference says is, it says you could go to AAA.com or
 3 BBB.com for our rules. It doesn't link right to the
 4 rules.

5 So a person would have to go on the cite,
 6 would then have to navigate the site, which we -- we
 7 invite Your Honor to try to do that. And then you have
 8 to try to find where the delegation clause is in that
 9 agreement.

10 So Verizon is expecting someone
 11 unsophisticated, not attorneys, to get an eight-page
 12 arbitration clause and then read it while they're
 13 buying their cell phone, and then navigate through
 14 whether in certain instances a court is to decide or if
 15 AAA rules apply or if BBB rules apply. And then
 16 they're supposed to go to that website and then
 17 navigate through the website, they have to dig around
 18 to find what rules actually apply to delegation.

19 I mean, that's interesting is, there's not --
 20 the word delegation is not even in their eight-page
 21 arbitration clause. It's not even in it.

22 And so those two cases are directly on point
 23 and they're published cases.

24 The cases that defense counsel is referring
 25 to are unpublished cases, even the Third Circuit case

1 is unpublished. And Third Circuit and Federal cases
 2 are not binding on this Court. It's New Jersey case
 3 law is what controls. And we ask that you look at the
 4 Quinn case and you look at -- the Bacon case cites to
 5 the Quinn case. And they're right on point. And so
 6 their incorporation of that is -- is invalid.

7 But, more importantly, even if Your Honor
 8 were going to get to the threshold question of, okay,
 9 well, let me look at these two clauses, trip -- AAA
 10 says an arbitrator should decide the clause. BBB says
 11 the arbitrator has the ability to decide what claims
 12 should be included in the arbitration, not decide
 13 unconscionability. It does not say the Court is -- the
 14 arbitrator is to decide the issue of whether the
 15 clauses is enforceable under unconscionability analysis
 16 or not. All it says is, it's to determine what claims
 17 are to be covered within the arbitration.

18 So that in itself conflicts. And we cited an
 19 Appellate Division case, Rockel v. Cherry Hill Dodge,
 20 which states where an arbitration clause is conflicting
 21 on the delegation issue -- which this certainly is.
 22 There's portions of this that gives it to the Court,
 23 there's portions of this that gives it to AAA, there's
 24 portions of this that give it to BBB. And then even if
 25 a person could find those two rules, because they're

1 not specifically cited to, which is -- makes it invalid
 2 under Quinn, but even if they can find it, they
 3 conflict.

4 And so if you look at Rockel v. Cherry Hill
 5 Dodge, when -- when there's delegation clauses or --
 6 that conflict, or whose to decide if that conflicts,
 7 the Court is to throw it out and let the Court decide.

8 And so in this -- and by the way, these --
 9 you know, this isn't -- this has already been decided
 10 once. So you have -- Your Honor has a nice roadmap in
 11 MacClelland, which has the same standard, which is the
 12 clear and unmistakable standard. That's the same in
 13 California. And another court in California just
 14 decided less than a month ago that this exact clause
 15 should be decided by the Court.

16 So I have nothing else to say on the
 17 delegation issue.

18 I'd like to go to why this agreement is so
 19 one-sided and unconscionable. So as we set forth in
 20 our papers, there's several reasons why this -- this
 21 arbitration clause (inaudible). Out of the gate,
 22 before I even get to the public policy issues and also
 23 the issues of having ten cases go forward at a time,
 24 something that's really overbearing and -- and really
 25 unfair to the customers is, the contract bars extrinsic

1 evidence.

2 So the beginning of the arbitration clause
 3 says, any dispute between you and us, you being the
 4 customer, whether it's with a sales rep., whether it's
 5 billing disputes, whether it deals with the product,
 6 must go to arbitration. But then later in the clause
 7 it says all disputes -- this -- it says this agreement,
 8 which is the customer agreement, governs all disputes
 9 and no extrinsic evidence can be relied upon, whether
 10 it be documents, advertisements, or statements from
 11 sales representatives.

12 The problem with that clause, Your Honor, is
 13 the customer agreement doesn't have the terms. The
 14 customer agreement doesn't have the pricing. The
 15 customer agreement doesn't have representations in the
 16 advertisements. The customer agreement doesn't have
 17 what people say. So we will be unable to prove our
 18 case if we go to arbitration.

19 We're challenging in this case that Verizon
 20 told people in their bills that they have -- that they
 21 have to pay surcharges and that the surcharges in their
 22 bill say that they're government fees, federal charges,
 23 or taxes that are imposed and that they're going to be
 24 passed on to you. And they list as an administrative
 25 charge under their surcharges that it's a government

1 fee, which we contend is a total lie.

2 Their advertisements gave people a flat price
 3 of what their charges would be and they say surcharges
 4 could apply. However, the surcharges here, we're
 5 contending, are a lie, that they just are another part
 6 of profit in their profit plan that they impose on
 7 people and it wasn't imposed -- they weren't honest
 8 with people.

9 But we can't prove our claim. We're in -- if
 10 this goes to arbitration, we're not going to be allowed
 11 to rely on a bill. We're not going to be allowed to
 12 rely on an advertisement. We're not going to be
 13 allowed to bring in witnesses to testify as to what
 14 they told people when they bought their plan. We will
 15 lose our claim. We will lose. We will not be able to
 16 prove our claim because the customer agreement doesn't
 17 have the terms we need.

18 To get to the other egregious portions of the
 19 agreement, the agreement says because defendants are
 20 afraid of mass arbitrations, which is a -- which is a
 21 (indiscernible) phenomenon over the last couple years
 22 and we're pursuing one here. They don't want to pay
 23 the arbitration costs, but they have to have the
 24 arbitration agreement say that they're willing to pay
 25 the costs or the agreements will be procedurally

1 unconscionable.

2 So they say they want to pay the cost. So
 3 their new way to get out of basically preventing a mass
 4 case and hearing -- picking off people one by one is to
 5 have this -- this clause that says if you per --
 6 client, decide to hire a law firm, that law firm, if
 7 they have more than 25 persons, have to go through this
 8 claim process of 10 claims going forward at a time, 5
 9 picked from the defendant and 5 picked from the
 10 plaintiff.

11 So what's wrong with that? Well, first of
 12 al, if a person wants to do this cumbersome process,
 13 they have to either decide, well, if I stick with my
 14 attorney, who has all these claims, being us, over
 15 2500, this case is going to take 145 years to decide.

16 The defendants' argument to that position by
 17 plaintiff is, well, we have the bellwether process.
 18 And the bellwether process it -- of course, it's not
 19 going to take this long. And there's no reason or
 20 incentive for us to do more than ten at a time because
 21 if we lose the ten, we're going to settle and if we win
 22 the ten, plaintiffs are going to give up. Well, that
 23 sounds nice in theory, but that's not what the contract
 24 says. And we've got to go by what the contract says,
 25 not by just what Verizon might do gratuitously trying

1 to predict how this case goes.

2 The contract says, Verizon has the right to
 3 either settle cases after the bellwether process or
 4 continue to arbitrate. So what does that mean, if we
 5 have to continue to arbitrate? That means we pick 10
 6 at a time out of the 2500 people. That means,
 7 according to AAA's own website, each arbitration is
 8 going to take 6.9 months -- and even if it's
 9 streamlined in some purpose. Let's say they have 10 go
 10 at a time, that -- that's going to take 6.9 months,
 11 even a year, 10 at a time. And we have to get through
 12 2500.

13 Now what's onerous about that? The agreement
 14 says that they reserve the right to challenge the
 15 statute of limitations. So what's the big deal about
 16 that? That's a big deal because the plaintiffs can't
 17 even file any claims until the first ten are heard. So
 18 if you're someone, you know, a thousand in down the
 19 batch, 1500 in down the batch, your case can't even be
 20 filed. And if you look at that many people and you
 21 can't say the -- the bellwether process, oh, this is
 22 never going to happen. This is what the contract says
 23 will happen if they -- if we don't settle. You've got
 24 to do ten at a time. So it's going to 145 years for
 25 these cases to be heard. It's going to -- the statute

1 of limitation will expire and the people will be dead,
 2 literally.

3 And now the defendants in California, because
 4 they saw this as a problem, they said, oh, we're going
 5 to amend, we're not going to enforce the statute of
 6 limitations. Well, even if you don't enforce the
 7 statute of limitations, which, by the way, they can't
 8 waive it. There's a -- we briefed that. They can't --
 9 they can't change it midstream in the litigation. But
 10 even if the Court were to say, well, they said -- you
 11 know, Mr. DeNittis, they said they're going to waive
 12 the statute of limitations, that doesn't matter. It's
 13 going to take 145 years for this -- for this to be
 14 decided.

15 We can't, as plaintiffs, against a company
 16 like Verizon, have to hope that they're going to be
 17 gratuitous and settle with us. What's -- the defense
 18 counsel said what's the incentive for them to continue
 19 litigating. The incentive is to preclude claims.
 20 What's the incentive for them to settle? They could
 21 have ten go at a time, have very little exposure, and
 22 take years for these cases to be decided. Hundred --
 23 over a hundred years. Why -- why would they settle? I
 24 mean, I don't see why they would. It's ridiculous.

25 So in addition to that clause, it also

1 violates five -- Rule 5.6(b) of the Rules of
 2 Professional Conduct. Why? Because the only way a
 3 consumer gets out of this egregious agreement about
 4 having to wait 145 years, potentially, for their claim
 5 to be decided, is for them to pick another attorney.

6 And under Rule 5.6(b) and under the Cardillo
 7 case and under the Jacobs case, a person has an
 8 unfettered right of choice of counsel. Unfettered.
 9 It's a very important rule.

10 So now these people are going to have to --
 11 they're like, well, if we want DeNittis Osefchen and
 12 Prince, who has been doing consumer litigation for over
 13 30 years, we don't want to -- you know, if we use them,
 14 our claims are going to be decided -- may never be
 15 decided or now we have to choose another -- another law
 16 firm. Well, guess what? That's against public policy
 17 and that's against the Rules of Professional Conduct,
 18 and that also makes this agreement unenforceable.

19 So this agreement is unenforceable already
 20 because it bars any extrinsic evidence. It's against
 21 public policy because it's affects people's right to
 22 choose their attorney. And, also, it should be
 23 unenforceable because it precludes claims from people
 24 ever potentially getting their cases heard.

25 I mean, again, Your Honor, another court, in

1 MacClelland, a federal judge found that our arguments
 2 on this were persuasive and ruled that the entire
 3 clause was unconscionable because these egregious
 4 provisions being -- being unenforceable.

5 But it doesn't stop there. What -- what's
 6 crazy is, that's not the extent of why this is --
 7 should not be enforceable. Another reason is, it bars
 8 damages.

9 So there's one section of the agreement that
 10 says an -- the arbitrator can award the same damages as
 11 a person -- as if they're in court. But then later it
 12 says a person may not get consequential damages, treble
 13 damages, punitive damages, injunctive relief. Well,
 14 guess what? The Supreme Court said that that type of
 15 clause limiting damages is unenforceable in the case --
 16 again, Brown v. Sanford, and the other cases that we
 17 cite.

18 So that's another reason Your Honor could
 19 say, hey, this is unconscionable, this is restricting
 20 people's rights that they would have in court. And
 21 there's authority for it, Your Honor, for that reason
 22 to throw it out.

23 Another reason to throw it out is, the clause
 24 conflicts as to attorney fees. It says the -- the
 25 arbitrator may award attorney's fees if there's fee

1 shifting. But then it give us convoluted, really, hard
 2 for an attorney -- we -- our -- our office had to read
 3 it multiple times to follow, where arbitration clause -
 4 - fees may be awarded but they may not be awarded,
 5 really limiting quite extensively when attorney fees
 6 can be awarded. That's another reason to throw this
 7 out.

8 In addition, it's a contract of adhesion.
 9 These people did not have their right to choose. They
 10 didn't have a right to choose this agreement. Every
 11 cell phone company, every cable company, every -- most
 12 consumer contracts, every gym membership, they have
 13 arbitration clauses and class action waivers. Try to
 14 go in to buy a cell phone and say, well, you know,
 15 Verizon, I'm not signing this agreement. Oh, I'm not -
 16 - I want you to take this clause out. They're not
 17 going to take this out. I mean, they won't. They'll
 18 say, sorry, we can't sell you a phone.

19 So, again, that's another reason why this
 20 should be unenforceable.

21 So for all of these reasons, number one, we
 22 think it's clear, Your Honor is to decide what -- that
 23 -- whether this contract is unenforceable or not.

24 And then for all the reasons I just
 25 articulated and that are in our papers, this should not

1 be -- under -- Your Honor, the last decision Your Honor
 2 has to make, if you agree with plaintiffs, is can you
 3 sever these clauses and allow some of this to go to
 4 arbitration and some of it to stay?

5 Or, can you throw the whole clause out. And
 6 under the Dong Ho case that we cited, if a -- if a
 7 contract is permeated with unconscionability
 8 throughout, which I think for all the reasons I just
 9 articulated, frankly, how can Your Honor not, but if
 10 you find that it's permeated throughout the agreement,
 11 Your Honor is -- just throw out the entire arb clause
 12 and let the case stay in court.

13 So for all of these reasons, Your Honor, I
 14 respectfully submit that, one, that Your Honor decide
 15 that this issue of whether the arbitration clause is
 16 unconscionable or not. Two, respectfully, find that it
 17 is unconscionable for all the reasons I articulated,
 18 which, again, I don't think you'd be taking a -- a real
 19 leap here. This is already what one federal court has
 20 found. And then, third, just severing the entire
 21 agreement.

22 For all these -- all these reasons, Your
 23 Honor, I respectfully submit.

24 THE COURT: All right.

25 MR. JACOBSON: Can I reply briefly, Your

1 Honor?

2 THE COURT: You may.

3 MR. JACOBSON: This is Jeffrey Jacobson,
4 again. Thank you, Your Honor, for your time.

5 It seems we agree that the main question here
6 is who decides. Is it for the arbitrator to decide
7 these questions that Mr. DeNittis raised or is it for
8 Your Honor?

9 Mr. DeNittis talked about the case in
10 California, MacClelland, that was decided a few weeks
11 ago. And Mr. DeNittis said that the standard in
12 California is the same standard that Your Honor should
13 apply, except it's not. The only reason why Judge Chen
14 decided that California case as he did is because the
15 Ninth Circuit that controlled him left open the
16 question of whether in a consumer contract reference to
17 the AAA rules suffice to delegate questions like that
18 to the arbitrator.

19 The Third Circuit and every other Federal
20 Circuit Court of Appeals that's looked at this issue --
21 and by the way this is a case that's controlled by the
22 Federal Arbitration Act, so the Federal Court decisions
23 here interpreting the FAA should be dispositive. The
24 Third Circuit did not leave that question open. No
25 other circuit has.

1 And so, you know, we don't agree with Judge
2 Chen's opinion. We've already appealed from Judge
3 Chen's opinion to the Ninth Circuit. That -- it's
4 going to take some time, but it's simply not true that
5 that California case applied the same standard because
6 it couldn't have. He was bound by Ninth Circuit
7 precedent. Here, I understand that the Third Circuit
8 is Federal, but we've got Appellate Division
9 unpublished decision saying incorporation of AAA rules
10 is enough. We've got a Third Circuit authoritative
11 decision saying incorporation of AAA rules is enough.
12 And so these questions really should be decided by the
13 arbitrator not by Your Honor.

14 Mr. DeNittis cited two cases, Alpert against
15 Quinn and Bacon against Avis, and he said that those
16 dealt with arbitration agreements. That wasn't quite
17 true, either. The Alpert against Quinn case didn't
18 involve arbitration at all. And the Bacon against Avis
19 case did not involve incorporation of AAA rules. It
20 was a question of whether the arbitration agreement
21 incorporated terms from the rental jacket that the
22 customer received.

23 So neither of those cases contradicts the
24 Third Circuit's holding that if you cite AAA rules it
25 suffices to delegate arbitrability questions to the

1 arbitrator.

2 So once the Court decides, if it does, that
 3 incorporation of AAA rules delegates every other
 4 question that Mr. DeNittis raised to the arbitrator,
 5 that's the ball game. That means we compel arbitration
 6 and Mr. DeNittis can make these points to the
 7 arbitrator and off we go. And there is no basis in any
 8 New Jersey decision, in any Third Circuit decision for
 9 the Court to hold that incorporation of AAA rules does
 10 not suffice to delegate these issues to the arbitrator.

11 And just a couple of points in response to
 12 Mr. DeNittis. He -- he, again, raises this idea that
 13 Verizon can just keep arbitrating these cases until the
 14 cows come home. Again, that's not what the clause
 15 says. If Verizon goes oh for ten and then maybe goes
 16 oh for twenty, and if we try to keep going, the clause
 17 provides a role for the Court. Because the stated goal
 18 of this batching process is to yield a resolution. And
 19 if Verizon is acting unreasonably, there is an explicit
 20 invocation of the Court's authority to do something
 21 about it. That issue -- that situation is just simply
 22 not presented here. We haven't started the batching
 23 process yet. Not a single one of these claims has been
 24 arbitrated.

25 So, you know, again, this -- this idea that

1 we can't try the bellwether process and see what
 2 happens because it's unconscionable is just not right.

3 The next thing Mr. DeNittis talked about was
 4 what I'll call the contractual integration clause,
 5 which says that the agreement is the agreement.

6 So, you know, this is another issue that
 7 should be decided by the arbitrator. But I have to
 8 say, I don't understand Mr. DeNittis's argument about
 9 this provision at all. It says that the written
 10 contract is the contract and a consumer can't argue
 11 that something an agent said orally is also part of the
 12 contract. I don't understand what's wrong with that.

13 The first sentence of the customer agreement
 14 says, "your service terms and conditions are part of
 15 the agreement." So Mr. DeNittis's statement that the
 16 pricing terms aren't part of the agreement is simply
 17 wrong.

18 And nothing in this provision stops the
 19 customer from arguing that something an agent said to
 20 him or her, you know, that fraudulently induced the
 21 customer to execute the contract is -- you know, that
 22 you can make a fraudulent inducement claim under this
 23 provision and you can use something an agent said as
 24 the basis for a statutory consumer fraud claim.
 25 Verizon hasn't argued otherwise and I would say that

1 this provision doesn't give it a basis to argue
 2 otherwise.

3 And the other provision that Mr. DeNittis
 4 pointed to is that the agreement does contractually
 5 preclude anything other than direct damages. He may or
 6 may be -- may or may not be right. But that bar on
 7 treble damages is enforceable against New Jersey
 8 consumers asserting claims under the CFA. That's a
 9 question for the arbitrator.

10 I do know that in plaintiffs' brief when they
 11 cited the Morgan against Sanford Brown case, which is
 12 225 N.J. 289, they did not characterize that case
 13 correctly.

14 In Morgan, the Supreme Court held that once
 15 the Appellate Division had determined that an agreement
 16 delegated unconscionability questions to the
 17 arbitrator, the court should not have opined at all on
 18 whether the treble damages bar was enforceable in that
 19 case.

20 Yes, it's true the Supreme Court said in that
 21 case that, however -- you know, they used the words
 22 "however correct it may be" when they were referring to
 23 the Appellate Division's statement that the bar on
 24 treble damages in the arbitration agreement was not
 25 enforceable. But they held that that was a decision

1 that should have been made by the arbitrator, as it
 2 should be here.

3 So, you know, I get it. I -- I -- I know
 4 what he's trying to do. It's what they did
 5 successfully in California under a different standard,
 6 but there are a couple of challenges he wants to make
 7 to the arbitration agreement, all of which can be
 8 easily presented to the arbitrator and the arbitrator
 9 can make the decisions and, you know, that's what
 10 happens in these cases.

11 Your Honor, I'll just end where I began.
 12 They filed 2500 -- or they want to file 2500 AAA
 13 arbitrations. They could file all of these cases in
 14 small claims court today, if they wanted to. The
 15 agreement allows that.

16 They want to have these claims go forward in
 17 arbitration immediately because they think Verizon
 18 should have to write a big check to AAA. And they
 19 cited some other cases where companies did not have
 20 provisions like this, where there was not a batching
 21 process, and the company said, well, wait a minute, we
 22 shouldn't have to write this big check, and the court
 23 said, well, yes, you should because the contract didn't
 24 provide, as Verizon's does, for a batching process.

25 Here we have one. It should go forward. If

1 something goes wrong with it, there's a role for the
 2 Court later. But there's nothing in the agreement that
 3 it's unconscionable or should preclude the Court --
 4 and, no, sorry.

5 One last thing. I apologize.

6 This idea that we're stopping people from
 7 having their choice of counsel, we're not. As we said
 8 in our reply brief, as many people can hire Mr.
 9 DeNittis and Mr. Hattis as want to hire them. And they
 10 can get the benefit of their experience and the benefit
 11 of the fact that they have a lot of claims. And if
 12 there's a mass resolution, they would be included in
 13 it. All it says is, let's have a bellwether process.
 14 Let's see how it goes.

15 So this is not a case where we're interfering
 16 with people's choice of counsel. It's not a case where
 17 we're making people wait 149 years. We're going to
 18 have ten cases that are going to move forward shortly.
 19 If it's too late to get a New Jersey person in that
 20 first batch, we can make sure a New Jersey person gets
 21 in the second batch. We can test all these claims
 22 under the CFA.

23 And if something goes wrong, there a couple
 24 of provisions allowing the Court to sound off later.
 25 But for now, we submit that these cases should be --

1 should be compelled into arbitration.

2 THE COURT: Counsel, I've got a question for
 3 you. The --

4 MR. JACOBSON: Sure.

5 THE COURT: You say that the issue of treble
 6 damages, that -- that's a question for the arbitrator?

7 MR. JACOBSON: It should be. Because all of
 8 these questions about enforceability of anything other
 9 than the arbitration agreement itself are for the
 10 arbitrator. So once -- in other words, once the Court
 11 finds that the agreement was validly formed, whether or
 12 not that ban on treble damages is enforceable as
 13 against a New Jersey consumer under the CFA would be
 14 for the arbitrator, that's correct.

15 THE COURT: Okay.

16 MR. JACOBSON: Which is exactly what the
 17 Supreme Court said in Morgan against Sanford Brown.

18 MR. DeNITTIS: Your Honor, if I may just
 19 respond to a couple points? I'll be brief.

20 THE COURT: You may.

21 MR. DeNITTIS: So just so Your Honor
 22 understands, the FAA doesn't mandate that this gets --
 23 that -- that the -- the arbitrator decides this issue.
 24 The FAA says courts are to look at state contract law
 25 to determine unconscionability and who decides the

1 arbitration clause.

2 So this is your decision, Your Honor, number
 3 one. It's not that the FAA is mandating you to do
 4 anything.

5 As to this whole issue about referring to a -
 6 - the AAA's rules and standards it -- that is
 7 referenced by incorporation. First, defense counsel
 8 makes it sound like there's all of these cases all
 9 around the country that have held this. They're not
 10 before Your Honor. The only cases that defense counsel
 11 has cited are a couple unpublished federal cases that
 12 are not binding on this court. This is a -- this is
 13 state law contract law that is binding on this court.
 14 So they are not binding. And they weren't even
 15 published decisions, number one.

16 Number two, they're distinguishable in that
 17 they only had AAA. Here we have AAA and we have BBB
 18 and we also have instances where the Court is to
 19 decide. That wasn't presented in any of those federal
 20 cases that were unpublished. Okay. And so this --
 21 this notion that, oh, this is such a well-settled issue
 22 is just not true.

23 Third, I -- I will be comfortable to rest on
 24 Your Honor reading Alpert v. Quinn and the Bacon case
 25 that we cite, that you wrote down, and Your Honor could

1 decide for yourself if you think those cases would be
 2 applicable here.

3 What those cases talk about is reference by
 4 incorporation either to another document or to a
 5 website and that it has to be specific and that it has
 6 to be clear and that it has to be with -- identified
 7 without doubt.

8 And I ask Your Honor to look at their
 9 arbitration clause that they have before Your Honor and
 10 you go on to the website and try to find -- try to find
 11 what defense counsel makes it that it's so easy to
 12 identify as to the rules that are supposed to apply
 13 here.

14 Third, I find it interesting, defense counsel
 15 and defendant's position is very contradictory. They
 16 say the bellwether process is fine because they could --
 17 you could do ten cases at a time and then they could
 18 go back to court if someone doesn't like it because the
 19 Court should decide that issue. We're asking the Court
 20 right now to decide the enforceability of the mass arb
 21 restriction. We're asking the Court to do that.

22 So what the defendants are asking, right, to
 23 Your Honor is, well, don't decide this. You know --
 24 they've argued to the Court you should -- it's up to
 25 the courts to decide that issue, let it go to

1 arbitration, let it kind of ferret itself out and then
 2 whoever is unhappy with it can come back and challenge
 3 it. Well, we're asking you to -- to review it right
 4 now.

5 They're basically telling us to go -- I don't
 6 understand that argument. They're saying, well, you
 7 could do the bellwether process, do ten, see how they
 8 come out, and then either party -- it's not like it
 9 (inaudible) basically says either party could challenge
 10 this clause with the court. The (inaudible) we're
 11 doing it now. We're challenging that issue -- that
 12 clause right now with the Court. They're saying don't
 13 decide it, go to arbitration, then if you don't like
 14 the results of the arbitration, come back and attempt
 15 to throw it out.

16 Why even go through that expense and that --
 17 those steps? Your Honor could decide it right now.
 18 And I don't think either of us disagree on that.

19 Also, again, you have to read what the
 20 contract says. This whole bellwether process is
 21 bologna. It says after the ten are heard, it could
 22 settle or the parties can continue to arbitrate. So
 23 what's going to be -- what's going to happen is, what
 24 defendant wants to happen is, let ten go forward. And
 25 then after those ten cases are decided, they could

1 pretty much unilaterally decide if they want to settle
 2 or not.

3 And if they don't want to settle, they're
 4 going to say, well, keep arbitrating because why -- why
 5 would they not? They're not, certainly, going to go to
 6 court and challenge it.

7 So we're asking for Your Honor to review it
 8 now. I mean, that's -- I don't understand -- I don't -- I
 9 really don't understand that argument.

10 And so, you know, that -- those are -- are --
 11 are really just what I wanted to respond to.

12 I think -- you know, I think the case law is
 13 clear by the Supreme Court of New Jersey to decide who
 14 determines the arb -- arbitrability of an arbitration
 15 clause. It's presumed to be the court, unless it's
 16 clear and unmistakable. And I think the cases that
 17 defendant cites are just unpersuasive and they're
 18 persuasive authority, at best, anyway.

19 Look to the New Jersey cases that we cite,
 20 and Your Honor could determine is this clear and
 21 unmistakable. We submit it's not. We submit it just
 22 simply isn't.

23 And so, you know, we would ask that not only
 24 do you decide the arb clause, but you could also get to
 25 the unconscionability issues.

1 I think I went on at length about why it's
 2 unconscionable. I just think you could look at -- you
 3 know, look back at our arguments. They're in the
 4 papers. I think the -- I think at this point, not to
 5 belabor different points, I think they speak for
 6 themselves. I think this is a really egregious
 7 agreement.

8 Not to mention, even the process of picking
 9 ten arbitrations, that's a conflict for defendant --
 10 for plaintiffs' counsel. Because being that these
 11 claims could be time precluded, we'd have to pick five.
 12 That's a conflict of interest for us, Your Honor. How
 13 do we -- which five do we pick? And if we -- as we go
 14 through this process, we pick five, defendants pick
 15 five. If defendants decide they don't want to settle,
 16 then we are going to be faced with a timing -- a timing
 17 issue.

18 And, you know, defense counsel is like, well,
 19 why would we ever enforce like the statute of
 20 limitations. Well, because they want to get out of
 21 liability. It's -- I mean, it's -- you know, that's
 22 not -- you know, they make it sound like they're very
 23 benevolent, but I'm sure they'll do whatever they can
 24 to preclude claims.

25 And so, you know, again, you have to look to

1 what the agreement says. And even forcing plaintiffs'
 2 counsel to have to choose between five and then another
 3 five and then another five, that in itself is a
 4 conflict. We haven't chosen five. We refuse to do so
 5 because we believe it's a conflict.

6 And so, you know, this -- this agreement,
 7 other than the California court that heard this, these
 8 agreements, as defense counsel just emphasized, like
 9 Microsoft just changed theirs, another company that
 10 we're familiar with, Optimum, just changed theirs, this
 11 -- Verizon not too long ago changed theirs, this is --
 12 this is a recent advent to avoid this mass arbitration
 13 process that companies are so fearful of.

14 This is not settled law. The only reportable
 15 case or the only case -- I don't know if it's a
 16 published decision yet. The only case that's dealt
 17 with this exact issue and the exact clause before Your
 18 Honor is the MacClelland case, which found in our
 19 favor.

20 So, you know, it's not -- this is -- these --
 21 there's going to be more of these cases, for sure, that
 22 go before the Court because this is just a really
 23 egregious clause.

24 And so I -- you know, with all that, Your
 25 Honor, I appreciate your patience, and we -- we submit

1 on the (inaudible).

2 MR. HATTIS: Your Honor, be -- before we
 3 submit, I'm sorry, this is Dan Hattis. I -- I'm co-
 4 counsel with Steve DeNittis. I think I have a pro hac
 5 vice pending. I just had -- if I could speak just for
 6 60 seconds, if I would have the permission of the
 7 Court?

8 THE COURT: I'm going to time you, Counsel.

9 MR. HATTIS: Okay. Excellent.

10 With regard to the delegation issue, you
 11 know, the -- what -- the Better Business Bureau
 12 arbitration rules do not have a delegation clause. And
 13 -- and Judge Chen in -- in the MacClelland case found
 14 so.

15 And, in fact, I defy Verizon to find a single
 16 case in the entire nation that ever found that there's
 17 a delegation clause in the BBB rules.

18 As -- as my colleague said, it only says that
 19 the arbitrator should -- so what they cite in their
 20 papers is the arbitrator should decide any disputes
 21 about whether a particular issue falls within the
 22 parties' arbitration agreement. Well, act -- what --
 23 what falls in the agreement, not the validity of the
 24 clause itself, which is very different than what he AAA
 25 says.

1 Also with regard to the -- you know, the
 2 point that, well, why don't we file in small claims.
 3 We're also asking in these arbitrations for injunctive
 4 relief to stop the -- to stop the charging of the --
 5 the fee in the future.

6 THE COURT: Five seconds, Counsel.

7 MR. HATTIS: And, you know, that's something
 8 small claims can't do.

9 Okay. And -- and anyway, that's -- that's --

10 THE COURT: I think you made your point,
 11 Counsel.

12 MR. HATTIS: -- generally, you have the
 13 ability to do --

14 THE COURT: Thank you very much.

15 All right.

16 MR. HATTIS: Thank you.

17 THE COURT: Gentlemen, give me a -- a few
 18 minutes. I want to look at these cases that you've
 19 highlighted for me. I'll take another look at them.
 20 Give me about 20 minutes.

21 MS. LEV: Do you want us to stay on the line,
 22 Your Honor?

23 THE COURT: Stay on the line. I'll have an
 24 answer I'll have a decision.

25 MS. LEV: Okay. Thank you.

(Recess taken 12:02 p.m. to 12:30 p.m.)

THE COURT: All right. It's 12:30. I took a little more time than I wanted to.

We're back on the record in L-160-22.

We have plaintiffs' counsel on the line?

MR. DeNITTIS: Yes.

THE COURT: We have defendants' counsel on the line?

MR. JACOBSON: Yes, Your Honor.

THE COURT: All right. I've gone through all this. I looked at some of those cases. And let me just start out by saying that I really have no basic hostility to the concept of arbitration. It's part of -- the New Jersey Supreme Court has said that that's -- you know, we do want to try to resolve cases and this is one of the way we do it, consistent with Federal Arbitration Act and, as well, as the New Jersey statutes.

I have to note that -- that -- I have to say that I'm unconvinced that the bellwether process set forth in this agreement is, per se, unconscionable. I'm not quite so sure this really limits plaintiffs' right to choose their own counsel.

On the subject of arbitrability, Justice Albin does say in the Morgan case that this has got to

be clear. There is language in both the rules for AAA or Better Business Bureau arbitration that does seem to indicate that arbitrators get to decide what's arbitrable and what's not. Whether that's clear enough to meet the standards established by Justice Albin, who just retired, I'm -- I'm not going to get into right now.

I'm going to have to deny the motion based on the issue -- based on the fact that the agreement bars treble damages. By barring treble damages, basically, you -- you eviscerate the -- the applicability of the Consumer Fraud Act.

Treble damages, along with counsel fees, that's the heart of the Consumer Fraud Act. That's what gives the act its teeth. It's been upheld to be constitutional.

And the purpose -- the purpose of treble damages, it's intended to punish the wrongdoer and deter others from engaging in unfair and deceptive commercial practices. That's -- you'll find in the Supreme -- New Jersey Supreme Court cases of Furst v. Einstein Moomjy, 182 N.J. 1, that's at 14, it's 2004 case.

And without -- without that, you don't have -- you don't have the deterrence factor about -- about

1 unconscionable practices in the marketplace.

2 Now you can have arbitration. You can have
 3 these things arbitrated. The courts have clearly
 4 allowed that. That's -- the Appellate Division case is
 5 Gras v. Associates First Capital 346 N.J. Super. 42, an
 6 Appellate Division case from 2001, certification was
 7 denied by the Supreme Court.

8 And the Court found no inherent conflict
 9 between arbitration and the underlying purposes of the
 10 Consumer Fraud Act, noting that the plaintiffs can
 11 vindicate their statutory rights in the arbitration
 12 forum. But if there's no treble damages, they're not
 13 vindicating their rights under the consumer -- under
 14 the Consumer Fraud Act. It -- it just cuts the legs
 15 out from -- from that -- that particular remedy.

16 And defense counsel suggested, well, the
 17 arbitrator could decide whether or not this can be
 18 enforced. And I disagree. This is not a question of
 19 whether the arbitrator decides what's arbitrable. This
 20 is a question of whether or not the agreement itself is
 21 unconscionable and contrary to public policy.

22 Every Superior Court judge takes an oath to
 23 uphold the laws of the State of New Jersey. I can't
 24 delegate -- I can't farm that out to a AAA arbitrator.
 25 That's a responsibility of this Court to determine and

1 not some private party.

2 And it -- so I have to find that an agreement
 3 that allows a business -- a corp -- you know, a
 4 business entity to immunize themselves from -- from the
 5 Consumer Fraud Act through arbitration agreements to be
 6 contrary to public policy. I mean, they -- they can no
 7 more do that than they can have an arbitration
 8 agreement that says they're not bound by the law
 9 against discrimination, they're not bound by minimum
 10 wage laws.

11 Now all those things, the rights of -- of
 12 consumers or their employees can all be referred to
 13 arbitration, but you can't erase their rights by virtue
 14 of the -- the arbitration agreement.

15 That's what makes this agreement
 16 unconscionable on its face. And, therefore, I am
 17 required to deny the motion.

18 Counsel, if you'd like to file an appeal,
 19 that's fine by me. If the Appellate Division says I'm
 20 wrong, no hard feelings.

21 MR. JACOBSON: But, Your Honor, this is
 22 Jeffrey Jacobson.

23 THE COURT: No. Counsel, that's my decision
 24 and --

25 MR. JACOBSON: No. But, Your Honor,

1 there's a --

2 THE COURT: -- and we got to break.

3 MR. JACOBSON: -- there's a sever --
4 there's --

5 THE COURT: No. No. No.

6 MR. JACOBSON: There's a sever --
7 THE COURT: What? What do you want to say?
8 MR. JACOBSON: Your Honor, there's a sever --
9 there's a severability clause, Your Honor.

10 THE COURT: I'm ruling against you, Counsel.
11 I'm denying your motion. Now what do you want to say?
12 MR. JACOBSON: There's a severability clause,
13 Your Honor, so you can find that that provision is
14 unconscionable, but then you have to address the
15 severability clause.

16 Finding one provision un -- you're -- I'm not
17 -- I'm not arguing with you on the -- on the treble
18 damages provision.

19 THE COURT: All right.

20 MR. JACOBSON: But by finding that provision
21 unconscionable, you can sever that provision and refer
22 the rest of the contract to the arbitrator.

23 MR. DeNITTIS: You -- you can do that, Your
24 Honor. You don't have to. You can also find that it
25 renders the -- the arb clause completely unenforceable

1 and you can deny their motion like Your Honor just did.

2 MR. JACOBSON: Yes, you could. But you would
3 have to make that clear so when we go to the Appellate
4 Division, we know what Your Honor decided.

5 THE COURT: All right. It's something I
6 don't remember in your pleadings, but --

7 MR. JACOBSON: Well, we could talk about the
8 fact that -- I mean, there is a severability clause,
9 Your Honor, and it does -- it does say that if you find
10 that something is unconscionable, you sever the rest.

11 THE COURT: Let me find the -- now I got to
12 find the clause.

13 (Pause)

14 THE COURT: Let's see.

15 MR. DeNITTIS: We also -- we also cited
16 arguments on that, too, Your Honor. We -- we cited
17 NAACP of Camden v. Foulke Management, 421 --

18 THE COURT: What's -- wait. What's the --
19 let me find the -- where can I quickly find the -- the
20 agreement? Having everything on a computer screen, it
21 makes it difficult.

22 Counsel, where would I find that?

23 MR. JACOBSON: Well, I've -- I've got it up
24 on my -- up on my computer by searching for Verizon
25 customer agreement.

1 THE COURT: Okay.
 2 MR. JACOBSON: It's -- it's -- it's in the
 3 docket as Page 2 of --
 4 THE COURT: Is this --
 5 MR. JACOBSON: -- the documented we submitted
 6 on -- attached to our -- one of our declarations on May
 7 13th.

8 THE COURT: May 13th. Let me find that. I
 9 can find that.

10 MR. JACOBSON: Page 2 of 124.

11 THE COURT: May 13th. Motion to stay case.
 12 And I'm already logged in.

13 Which declaration? The Kennedy Declaration
 14 Part 1 or Part 2?

15 MR. JACOBSON: It's page -- so I -- I --
 16 separated everything when I --

17 THE COURT: What page is it on?

18 MR. JACOBSON: -- transported myself -- it's
 19 on Page 9 --

20 THE COURT: Okay.

21 MR. JACOBSON: -- of the documents that were
 22 submitted 11:21 p.m.

23 And I can read the Court the language. It's
 24 at the very end of the agreement.

25 THE COURT: Oh. Here we go. I got the

1 customer agreement in front of me.

2 MR. JACOBSON: So at the -- at the very -- at
 3 the -- at the very end it reads:

4 "If any part of this agreement, including
 5 anything regarding the arbitration process," and then
 6 there's an except that doesn't apply, "is ruled
 7 invalid, that part may be removed from this agreement."

8 THE COURT: All right. Let's find the
 9 section --

10 MR. JACOBSON: It's in the (inaudible)
 11 paragraph of the --

12 THE COURT: Okay. Okay. I see that.

13 MR. JACOBSON: -- customer agreement.

14 THE COURT: Treble damages. Let me find
 15 that.

16 (Court reviewing document)

17 THE COURT: And where do I find the thing
 18 about treble damages. Where is that at?

19 MR. JACOBSON: So the treble damages is in --
 20 I'm sorry. The beauty of having it up this way is I
 21 can search for the word treble.

22 UNIDENTIFIED SPEAKER: It's on their Exhibit
 23 A, Your Honor, of the -- in support of the reply that
 24 was filed on June 10th.

25 MR. JACOBSON: It's -- it's Page 6 of the --

1 it's page -- it's Page 5 of the agreement. It's Page 6
 2 of the exhibit. It's under the waivers and limitations
 3 of --

4 THE COURT: Waivers and limitations --

5 MR. JACOBSON: -- liability.

6 THE COURT: -- liability. Okay.

7 (Court reviewing document)

8 THE COURT: Well, I think I probably have to
 9 strike out any damages permitted under the Consumer
 10 Fraud Act are severed.

11 MR. DeNITTIS: Judge, if I may be heard on
 12 this?

13 THE COURT: Go ahead.

14 MR. DeNITTIS: So the contract says "may."
 15 It doesn't say you have to do it. It's still your
 16 decision.

17 THE COURT: Yeah. I know.

18 MR. DeNITTIS: And under the cases that we
 19 cite in our papers, both NAACP of Camden v. Foulke
 20 Management, 421 N.J. Super. 404, (App. Div. 2011), as
 21 well as Dong Ho Lee v. Eun Kyung Park, which is an
 22 unpublished LEXIS opinion at 1233, at 35, (App. Div.
 23 May 27, 2015). It's your discretion whether to either
 24 strike it or --

25 THE COURT: Yeah. Counsel, I -- I -- I get

1 all that.

2 What I'm -- what I'm going to -- I am going
 3 to sever this. And if you want to file a motion for
 4 reconsideration, because I'm focusing -- mostly I'm
 5 focusing on the issue of consumer fraud. Once I
 6 spotted that last night when I was reading through all
 7 this, that's what I tended to focus on. And, you know,
 8 if there's something that -- that I didn't really --
 9 you want to take another run at this, I'll let you.
 10 Okay.

11 MR. DeNITTIS: Okay.

12 THE COURT: And maybe you'll convince me on
 13 something else. Who knows.

14 But what I will do, because the -- the damage
 15 issue -- I mean, there are certain -- the damages that
 16 are permitted under the Consumer Fraud Act, not
 17 necessarily -- I don't know that I can limit that to
 18 direct damages.

19 So what language? What would I use?

20 Okay. All right. I'm going to -- I'm
 21 striking -- this is the language.

22 The limitation on damages clause is severed
 23 as unconscionable to the extent that it conflicts with
 24 damages that are available under the Consumer Fraud
 25 Act, including, but not limited to treble damages.

1 So that's my decision.

2 So now do you want to -- you want to -- if
3 you think I gave short shrift to your arguments about
4 whether or not the arbitrability -- delegation on
5 arbitrability was sufficient, that's fine. I'd be
6 happy to take another look at that.

7 That's my decision for today. Have a good --
8 have a good weekend, guys.

9 MR. JACOBSON: Thank you, Your Honor.

10 MR. DeNITTIS: Thank you, Your Honor.

11 (Proceedings concluded at 12:47 p.m.)

12

13

CERTIFICATION

14

15 I, Lisa Mullen, the assigned transcriber, do
16 hereby certify the foregoing transcript of proceedings
17 on CourtSmart, Index No. from 11:16 a.m. to 12:47 p.m.,
18 is prepared to the best of my ability and in full
19 compliance with the current Transcript Format for
20 Judicial Proceedings and is a true and accurate
21 compressed transcript of the proceedings, as recorded.

22

23

24

25

/s/ Lisa Mullen

Lisa Mullen

AD/T 413

AOC Number

07/18/2022

Date

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